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Supreme Court of the United States

OCTOBER TERM, 1951

JOSEPH ROSENBLUM and SADIE ROSENBLUM, Co-Partners, trading and doing business as MODERN MANNER CLOTHES,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI (AND SUPPORTING ARGUMENT)

COPAL MINTZ,
Attorney for Petitioners.

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JOSEPH ROSENBLUM and SADIE ROSENBLUM, Co-Partners, trading and doing business as MODERN MANNER CLOTHES,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI (AND SUPPORTING ARGUMENT)

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Joseph Rosenblum and Sadie Rosenblum, co-partners, trading and doing business as Modern Manner Clothes, hereby respectfully apply for a writ of certiorari to the United States Court of Appeals for the Second Circuit to certify to this Court, for review and determination, its proceedings and final decree, dated December 17, 1951, and filed December 19, 1951, affirming an order of the Federal Trade Commission, issued December 19, 1950, and in accordance with the said order ordering, adjudging and decreeing that the petitioners, etc., in connection with their interstate commerce, cease and desist from

> "Using the word 'free,' or any other word or words of similar import or meaning, to designate, describe, or refer to wearing apparel, or other merchandise, which is not in truth and in fact a gift or gratuity

or is not given to the recipient thereof without requiring the performance of some service inuring directly or indirectly to the benefit of the petitioners". (R.* pp. 4-5, 55-6; the proceedings and order of the Federal Trade Commission are not yet reported).

The Opinions Below

The Court of Appeals rendered the following opinion (R. 54; 2 Circ., October 1951, pp. 219-220, not yet elsewhere reported):

> "PER CURIAM: Affirmed on authority of *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112; *Progress Tailoring Co.* v. *Federal Trade Commission*, 7th Cir., 153 F. 2d 103; and *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 2nd Cir., 143 F. 2d 676."

The Federal Trade Commission rendered no opinion save as the same may be implicit in the order disposing of exceptions in the discussion of Petitioners' Exceptions Nos. 1, 4, 5 and 9 (R. 16, 18, 20, not yet reported).

The Matter Involved

Petitioners maintain that the cases cited by the Court of Appeals are inapplicable to the facts of this case (see pp. 17-25, *infra*), that the Commission was without jurisdiction herein (see pp. 14-16, *infra*), and that the decisions below (apart from the question of jurisdiction) are in conflict with *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), *Parker Pen Co.* v. *Federal Trade Commission*, 159 Fed. 2d 509 (C. A. 7th, 1946), and *Matter of Samuel Stores, Inc.*, 27 F. T. C. 882 (1938).

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* References are to the pages of the certified transcript of the printed portions of the record and proceedings.

Petitioners are merchants. They sell principally women's dresses, coats, lingerie and other items of wearing apparel. They sell exclusively at retail through representatives and agents in the various localities of the United States who personally solicit the orders (R. 7-8, 31-33).

Petitioners employ their sales representatives or agents on a commission basis (R. 33-4). From time to time, petitioners send to their sales representatives or agents catalogs or style sheets which, as to each item, specify the deposit required from the purchaser to accompany the order, and the amount of the deposit so specified (or, at times, that less $1), constitutes the agent's commission or compensation for procuring the order (Com.'s Exs. 8, 10, Pets.' Ex. 1, R. 50-52; also Com.'s Exs. 1 and 2, not included in the certified transcript of record).

These agents, for the most part, are housewives who engage in this selling as a side line. To stimulate and encourage them to greater activity, petitioners, from time to time, send to them circulars offering them bonuses of "free" dresses if they sell, within specified months, stated numbers of specified items (R. 33-46; see Exs. at R. 47-53).

For each component sale, petitioners pay the full fixed commission regardless of the number of sales; the "free" dress is for the stipulated accumulation or aggregate of achievement and without any service which is not rendered in the earning of (and completely paid for by) the commission on each sale (R. 40-41, 45-6). (The testimony on that point, adduced by the Commission, was clear and uncontradicted, see R. 40-41, 45-6, quoted at pp. 23-4, *infra*.)

The petitioners' offers were contained only in circulars and pamphlets sent to their sales representatives and to those who, answering "want ads", applied for employment as sales agents (Findings "Three" and "Four" R. 8-9; R. 35-40, 43). These offers did not appear in the public press or in any matter distributed to customers or prospective customers or the public generally.

The full and precise terms of the petitioners' offers to their salespeople were "fairly and plainly stated" and "clearly set forth" in the circulars and pamphlets. *The Commission affirmatively acknowledged that to be the fact* (R. 17, under heading "Exception No. 3"; see p. 18, *infra*).

There is no claim that petitioners did not meticulously perform on their part the offers contained in their communications to their sales agents.

No evidence was presented that any one of the thousands of sales representatives or prospective sales representatives, to any extent whatsoever, had been deceived or misled by any of the petitioners' literature (R. 18, under the heading "Exception No. 5").

Nevertheless, the Commission found that petitioners' literature "are false, misleading and deceptive" because "in truth and in fact the respondents do not give the dresses or other articles of wearing apparel free, but require the payment of a valuable consideration on the part of the agents or salespersons in the form of service and the sale of a certain number of articles of wearing apparel by said agents or salespersons before the same are delivered to the agents or salespersons" and that the complained of literature "has had, and now has, the capacity and tendency to mislead and deceive prospective *distributors* of respondents' products into the erroneous and mistaken belief that such false statements and representations are true and that they will receive some of respondents' merchandise free" (Findings "Five" and "Six", R. 9-10).

Hence, the Commission concluded, petitioners' use of the word "free" constitutes "acts and practices • • • to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act" (R. 11).

This, the Court of Appeals affirmed in the brief *Per Curiam* memorandum quoted at page 2, *supra*.

Basis of Jurisdiction

This petition is submitted pursuant to Section 1254(1) of the Judicial Code (Section 1254(1), Title 28 U. S. C.) and Section 5c of the Federal Trade Commission Act (Title 15 U. S. C. Section 45c).[1]

The Federal Trade Commission issued its order herein on December 19, 1950 (R. 4-5). On February 15, 1951, well within the statutory period of 60 days, petitioners duly filed in the United States Court of Appeals for the Second Circuit (wherein petitioners reside and carry on their business) a petition for the review of that order (R. A-F).

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[1] That subsection, as far as material, provides:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code" (now section 1254).

The proceedings prescribed in Section 5c of the Federal Trade Commission Act were then duly had in that Court of Appeals. That Court, on November 29, 1951, rendered its decision of affirmance quoted at page 2 above (R. 54-5), and on December 19, 1951, entered a decree (R. 56-7) affirming the Commission's order and commanding obedience to the terms thereof.

This petition, together with a certified transcript of the proceedings and decree of the Court of Appeals and the requisite number of copies, is being presented early in February, well within the statutory three-month period.

The Questions Presented

This case, as indicated by the above statement of the matter involved, presents two questions of law:

First—Does the Federal Trade Commission have jurisdiction over, or in respect to, communications between a merchant and its salespersons, where there is no claim that competitors or competition have been adversely affected thereby?

Second—(a) Where literature or advertising, as the Commission itself agrees, "plainly and fairly" state the correct terms of an offer or of a sales compensation plan—so "plainly and fairly" that it is not claimed that even one of the thousands of recipients and readers in fact had been misled or deceived to any degree or extent whatsoever—may the Federal Trade Commission, nevertheless, condemn the literature as "false, misleading and deceptive", as having "the capacity and tendency to mislead and deceive" and as "unfair and deceptive" "acts and practices * * * to the prejudice and injury of the public"?

(b) Restricted to the specific facts of this concrete case, this question is: May the Federal Trade Com-

mission adopt a highly restricted—and, we say, doctrinaire and artificial—definition of the word "free", and condemn and restrain every other use thereof as misleading and deceptive even though, in context and as actually used, its meaning is plain, fair and clearly understood, and where indeed, the meaning could not be conveyed as simply and lucidly and succinctly by the use of other words?

The first of the above questions entails the construction of Sections 5a and 5b of the Federal Trade Commission Act (Title 15, U. S. Code, Sections 45a, 45b). Section 5a (since amendment in 1938) provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful"; and it empowers the Commission to prevent persons (with exceptions not material here) "from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" whenever (subsection b adds) such inhibition "would be to the interest of the public".

In this case, the Commission charged and found not "unfair methods of competition in commerce" but "unfair or deceptive acts or practices in commerce". Since unfairness to competitors is not charged, the Commission's concern under the Federal Trade Commission Act, it seems to petitioners, can be solely with the purchasing public—not with agents or employees of the seller in respect to their relations with their employer *qua* employer.

Reasons for the Granting of Certiorari

A writ of certiorari, it is respectfully submitted, should issue in this case because:

1. The question whether the jurisdiction of the Federal Trade Commission extends to relations and communications between a merchant and his sales representatives in the absence of injury to competitors or competition—

or, put differently, whether communications between a merchant and his sales people (which do not affect competition) can constitute "unfair or deceptive acts and practices in commerce" within the meaning of Sections 5a and 5b of the Federal Trade Commission Act—is basic, important and has not been passed on heretofore by the courts.

2. In view of the facts hereinafter set forth, the second question stated above (pp. 6-7, *supra*), both in its restricted and general versions, is of substantial general importance. In respect to the word "free", the Federal Trade Commission, as appears more fully below, for a number of years, has vacillatingly[2] conducted an extensive campaign—with substantial division and dissent among its members—and has issued scores of complaints and orders. After conducting many cases, the Commission, on January 30, 1948, by a three to two vote, adopted an "administrative interpretation regarding the use of the word 'free' " (44 F. T. C. 1427—see pp. 11-12, *infra*). In the course of years, the Commission procured the prohibition of the use of that word in "trade practice rules" adopted by 15 industries. A number of cases are presently pending against concerns who take pride in their business ethics. All of this activity reflects, on the one hand, the importance which the Federal Trade Commission attaches to the use of the word "free", and, on the other hand, the determined resistance by advertisers to being restrained from using the word "free" when it serves plainly and fairly to make lucid the realities of an attractive offer.

3. Manifestly important is the directly involved general question of whether the Commission may ascribe to an ordinary word in common usage an ultra-restricted

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[2] See footnote 3, pp. 13-14, *infra*, and compare with the Commission's argument in *Federal Trade Commission* v. *Standard Education Society*, quoted at pp. 18-20, *infra*, and with Federal Trade Commission's decision in *Matter of Samuel Stores, Inc.*, 27 FTC 882, quoted at pp. 20-21, *infra*.

meaning, in disregard of all its variables in ordinary usage, and prohibit its use otherwise—regardless of its usefulness to fairly and plainly and lucidly convey the truth.

4. The power asserted and exercised by the Federal Trade Commission in so interdicting the use of words—where no deception is intended or occurs or is likely to occur—violates, it is believed, this Court's decision in *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608 (1946).

5. The decision herein, it is believed, is in conflict also with *Parker Pen Co.* v. *Federal Trade Commission,* 159 Fed. 2d 509 (1946), decided by the Seventh Circuit Court of Appeals.

6. A decision by this Court in this case would be highly useful in the administration of the Federal Trade Commission Act. A decision against the Commission would result in its discontinuing a number of pending complaints and in its bringing no more complaints where no dishonesty is practiced. On the other hand, a decision in favor of the Federal Trade Commission would convince the mercantile world of the necessity, in regard to the questions here involved, of conforming to the Federal Trade Commission's views.

The Conflict Between the Decision Herein and Other Decisions

As appears from its *Per Curiam* memorandum (p. 2, *supra*), the Court herein believed itself concluded by this Court's decision in *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112 (1937), by its own decision in *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 F. 2d 676 (1944), and by the decision of the Seventh Circuit Court of Appeals in *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103 (1946).

For reasons set forth at pages 17-25, *infra*, it is believed that each of those cases is distinguishable and is not applicable.

Much more in point is the doctrine laid down by this Court in the more recent case of *Jacob Siegel Co.* v. *Federal Trade Commission, supra,* 327 U. S. 608 (1946), and the decision of the Seventh Circuit Court of Appeals in *Parker Pen Co.* v. *Federal Trade Commission, supra,* 159 F. 2d 509 (1946), rendered the same year as—ten and a half months later—that Court decided the *Progress Tailoring Co.* case.

Moreover, all of the referred to cases deal with advertising and representations to the consuming public; none related to communications from a vendor to his sales representatives.

The Importance of the Question as to the Use of "Free"

The Commission, in its brief to the Court of Appeals in this case, stressed the importance it placed upon its interdiction of the use of the word "free" in the following statement (at pp. 12-14 of that brief):

> "It has been the position of the Federal Trade Commission in this and other adversary proceedings, in trade practice conference rules adopted by numerous industries under the Commission's sponsorship, and in an administrative interpretation duly promulgated, published in the Federal Register, and codified in the Code of Federal Regulations, that it is a violation of Section 5 of the Federal Trade Commission Act to use the word 'free' or similar words to describe a product or service that is not in fact given unconditionally, without requiring the purchase of other goods or the performance of some act for the benefit of the offerer • • •.

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On January 30, 1948, the Commission adopted an administrative interpretation condemning use of the word 'free' to describe goods or services not given unconditionally. The full text of this interpretation is set forth in the Appendix to this Brief. (44 F. T. C. 1427; 13 F. R. 414, 16 C. F. R. § 4.1.) Substantially, the language of the inhibition contained in the order to cease and desist issued against petitioners follows that of the administrative interpretation.

Elsewhere in the Code of Federal Regulations (16 C. F. R. § 3.75) it is provided:

* * * * * *

and thereunder are listed some 129 cases in which the Commission issued orders banning this unfair practice.

Trade Practice Rules adopted since 1945 by the following fifteen industries contain provisions to the same effect as the Commission's order herein:

* * * * * *"

The Appendix to the Commission's brief to the Court of Appeals (pp. 32-3) quoted:

"Administrative Interpretation
Regarding Use of the Word 'Free,'
Promulgated January 30, 1948,
44 F. T. C. 1427

'The Federal Trade Commission has formulated and adopted an administrative interpretation with reference to the use of the word "free" and words of similar import in advertising to designate or describe merchandise sold or distributed in interstate commerce. This interpretation, which will be published in the Federal Register, follows:

"The use of the word 'free,' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce,

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that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act. [13 F. R. 414, 16 C. F. R. § 4.1.]"

'For a number of years prior to the adoption of this administrative interpretation, the Commission had given this matter consideration in connection with a number of its proceedings. As a result of the Commission's actions in these proceedings, which involved many varied circumstances and factual situations, numerous inquiries were received by the Commission from Better Business Bureaus and representatives of affected industries requesting for their guidance an administrative interpretation in this regard. After giving the matter the fullest consideration, analysis and study, and because of the widespread interest therein, the Commission decided that in addition to publication in the Register of the interpretation itself, a public release regarding the matter was desirable and necessary in order to advise all interested parties and to protect the public interest.

'Commissioners Freer and Mason voted in the negative on the question of the adoption of the administrative interpretation.' "

The cases presently pending before the Federal Trade Commission, in respect to the use of the word "free", include proceedings against:

Doubleday & Co., et al.	Docket No.	5569
Cadillac Publishing Co. Inc. ..	" "	5570
Walter J. Black, Inc. et al. ...	" "	5571
Book-of-the-Month Club, Inc. ..	" "	5572

In the brief of counsel supporting the complaint in the *Matter of the Book-of-the-Month Club, Inc., supra,* which was submitted to the Federal Trade Commission October 11, 1949, it was stated, at pages 3-4:

> "Proceedings by the Commission based on an allegedly deceptive use of the word 'free' are nothing new. Among them are the following: *Bradley-Boston, Inc.* (3461) 39 FTD 164; *American Products Company* and the *Zanol Products Company* (2836) 39 FTD 50; *Abraham Starr,* trading as *Superior Textile Mills* (3190), 39 FTD 53; *William C. Steffy and G. V. Parkinnon,* trading as *Atlas Globe China Company* (3238) 39 FTD 54; *Bernard Abrams and Abe S. Willner,* trading as *Linwood Sales Company, Inc.* (3414) 39 FTD 59; *Joseph Saladoff and Sara Saladoff* trading as *Novelty Premium Company* (3505) 39 FTD 67; *Abraham Leonard Koolish, Mrs. Ida B. Koolish and George William Ehrlich,* trading as *Universal Industries, Inc.* (3882) 39 FTD 69; *Aaron N. Sauer,* trading as *Nation-Wide Distributors* (3407) 28 FTD 363; *Premio Sales Company, Inc., and Rose Somners* (3489) 39 FTD 63; *K & S Sales Company and Fannie Cohn* (3497) 39 FTD 65; *Consolidated Silver Co.* (3789) 39 FTD 200; *Crown Novelty House* (3484) 40 FTD 322; *Gold Star Novelty House* (3449) 40 FTD 318; *National Publicity Bureau* (2908) 39 FTD 347; *Pacific China Co.* (3385) 41 FTD 1; *Trading Sales Co.* (3406) 31 FTD 1149; *Averbach Co., Inc.* (3342) 39 FTD 306; *Bonded Jewelers of America* (3459) 40 FTD 320; *Texas Tasty Co.* (3487) 40 FTD 325."[3]

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[3] Virtually all of the above citations are to modifications by the Federal Trade Commission in 1944-45 of orders which it issued in 1938-1940. In its original orders, the Commission did not prohibit the use of the word "free", but required only that all the terms of the offer be fairly stated. A typical instance is the order in the *Matter of American Products Company* and the *Zanol Products Company,* Docket No. 2836, wherein the Commission, in its order of November 8, 1938, directed the respondents to cease and desist from

(footnote continued on following page)

ARGUMENT

POINT I

In the absence of allegation, proof and finding of unfairness and damage to competitors, the Federal Trade Commission is without jurisdiction over the communications and relations between a merchant and his sales representatives.

Prior to the 1938 amendment, when the Federal Trade Commission's jurisdiction was restricted to "unfair methods of competition", allegation and proof of damage to

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(footnote continued from preceding page)

"3. Using the term 'free' or any other terms of similar import or meaning to describe or refer to articles offered as compensation for distributing respondents' merchandise unless all of the terms and conditions of such offer are clearly and unequivocally stated in equal conspicuousness and in immediate connection or conjunction with the term 'free' or other terms of similar import or meaning and there is no deception as to price, quality or character, or any other feature of such article or as to the services to be performed in connection with obtaining such article" (29 FTC 1306, 1316).

On August 16, 1944, the Commission modified the above to read:

"Using the term 'free' or any other term of similar import or meaning to describe or refer to articles offered as compensation for distributing respondents' merchandise" (39 FTC 50).

Similar modifications were made in virtually all of the other cases cited above.

Thus, it appears that in 1944 the Commission radically altered its position in respect to the true meaning of the word "free" when used in association with other words, or else came to feel that it possesses authority to legislate meanings. In that connection it may be significant that the complaint herein was issued on January 2, 1945 (R. 1). The extraordinary interval in this case of almost six years between issuance of complaint and entry of order, and the long lapses of time between steps (see R. 1-2), perhaps reflect doubts, misgivings and division within the Commission as to the correctness of the altered view, which seemingly culminated in the three-to-two division on the "administrative interpretation" quoted above.

competitors was indispensable and prerequisite to a cease and desist order (*Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643 [1931]).

No such damage was alleged or found in this case. The Commission's conclusion here is that the petitioners' use of the word "free" "constitute *unfair and deceptive acts and practices in commerce* within the intent and meaning of the Federal Trade Commission Act" (R. 11; italics supplied).

The 1938 amendment extended the Commission's jurisdiction also to "unfair and deceptive acts and practices in commerce". Thereby the jurisdiction of the Commission was enlarged to protect a class other than and in addition to competitors. The limitation "in commerce" was continued and repeated. Whose protection did Congress have in mind? Beer, in his *Federal Trade Law and Practice* (published in 1942) quotes the report of the Committee of the House of Representatives which recommended the amendment (House Report #1613, 75th Congress, 1st Session, August 19, 1937, p. 3) to the effect that the act, in its then original form, was construed by this Court in the *Raladam* case as providing protection exclusively to "competitors" and as affording "no protection to the consumer without injury to the competitor" and *"this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with a merchant or manufacturer injured by the unfair acts of a dishonest competitor"* (Beer, *supra*, at p. 79; italics supplied).

The "concern" of the statute in its amended form, then, is, and is limited to, the protection of consumers as well as competitors in respect to commercial unfairness which injuriously affect the general public. The protection of employees or agents (where neither competitors nor consumers are injured) is outside the scope of this legislation. Other Acts setting up other administrative bodies look

after those classes to the extent that Congress deems necessary and appropriate.

The limited nature of the jurisdiction of the Federal Trade Commission appears also in another way. It is limited to that which occurs directly "*in* commerce", as distinguished from the broader jurisdiction of other bodies under other Acts which extends to matters "affecting" as well as "*in*" interstate commerce. This was pointedly emphasized by this Court in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349 (1941).

It seems to the petitioners almost self-evident that communications from a merchant to his sales representatives or prospective sales representatives to stimulate their efforts to effect sales are acts *anterior to*, and in the hope of, commerce—rather than acts *in* commerce—acts which, if successful and to the extent successful, will lead to commerce but which of themselves are not commerce and may not even result in or be followed by commerce.

The Commission's finding here is only that petitioners' literature "has had, and now has, the capacity and tendency to mislead and deceive *prospective distributors* of respondents' products * * *" (Finding "Six", R. 10). Yet there was no charge and there is no finding that either competitors (or competition) or consumers have been adversely affected. It follows that the Federal Trade Commission has acted without jurisdiction.

This point does not seem to have been previously passed on by the courts.

POINT II

Petitioners use the word "free" with the utmost integrity—fairly, succinctly, simply and lucidly to describe an honest and fair business method of operation—without misleading, confusing or deceiving anyone; therefore, *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, and the other cases cited by the Court of Appeals, are not applicable since in those cases there were actual dishonesty and chicanery.

(1). The factual situation in *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112 (1937), was very different from the state of facts involved here.

Apart from the consideration that consumers were directly involved, the sales scheme there attacked was flagrantly dishonest and was perpetrated with numerous misrepresentations.

There was basic dishonesty there in falsely allocating the entire price of a combined offer to one of the units and representing the other unit as given away free when, in fact, the price was the sum of the regular prices of the units. In addition, there were fictitious and falsified testimonials and recommendations, falsified lists of "contributors and reviewers" and other chicanery. The entire sales method was fraudulent.[4] The testimony of many of the consumers, said this Court (at p. 117)—"citizens of ten States—teachers, doctors, college professors, club women, businessmen—proves beyond doubt that the practice • • • successfully deceived and deluded its victims."

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[4] Precisely the same situation, with perhaps more blatancy and chicanery, was involved in the earlier case of *Consolidated Book Publishers* v. *Federal Trade Commission*, 53 Fed. 2d 942, c. d. 286 U. S. 553 (1932).

(2). In marked contrast, in the case at bar, there is no dishonesty, no fake, no overreaching. The Commission so conceded when in overruling an exception to the omission of facts in a finding, it held the omission harmless because "the statements quoted by the trial examiner" sufficed to show that the petitioners' literature "clearly set forth the terms and conditions of [petitioners'] offer of 'free' merchandise", and the omitted contents "do not add to or detract from such offer" (R. 17 under the caption "Exception No. 3"). And no one was produced who had complained, or to testify, that she had been in any way confused, deceived, misled or imposed upon, as conceded in the Commission's statement in its Order Disposing of Exceptions, in respect to Exception No. 5 (R. 18):

> "The failure of the trial examiner to make a finding that no evidence was adduced that anyone, in fact, was misled or deceived, is immaterial. The fact that no such finding was made may be considered as proof of the fact that no evidence on that point was introduced."

(3). The inapplicability of *Federal Trade Commission* v. *Standard Education Society,* appears also from the argument which in that case the Federal Trade Commission presented to this Court. In its brief, signed, among others, by then Solicitor General now Mr. Justice Reed, then Assistant Attorney General and now Mr. Justice Jackson, and by W. T. Kelley, Esq., then Chief and now General Counsel for the Federal Trade Commission, the correctness of the use of the word "free" to describe something without additional charge although offered as a reward or a premium for, or to induce, a service or a purchase, was set forth as follows (at pp. 38-9):

> "* * * Genuine offers to give something away free of charge in order to induce a person to buy something else are not unfair. It is a commonplace that persons may be induced to buy if they think they are getting

a bargain. An opportunity to receive something free in addition to the article paid for is a powerful incentive to purchase. If a merchant thinks that his business will be benefited by the distribution of gifts, prizes, or premiums to his customers, that is his affair. His customers may gain by his apparent generosity. They cannot lose, and they are not deceived. They know that the purpose of the gift is to induce them to purchase another article, and they assume that the donor expects ultimately to recover the cost of the gift in increased returns from sales.[24]

* * * If [a customer] is told that [an article] is to be received 'free of charge' if another article is purchased, the word 'free' causes him to understand that he is paying nothing for that article and only the usual price for the other. If this is not the true situation, there is no free offer and the customer is misled by the representation that he is to be given something free of charge.

Thus if the regular price of a tube of tooth paste (to use an illustration suggested by respondents) is 35 cents and a dealer advertises that he will give away a tooth brush with each two tubes purchased, the normal understanding is that the price for the two tubes and the brush will equal the regular price for the two tubes alone—70 cents. There is nothing unfair in such a transaction. But if the dealer secretly adds

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"[24] It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium, the premium does not cost the customer anything. It is *free to him* regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is treated as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss." (Italics in original.)

> the regular price of the brush to the regular price of the two tubes, his statement that the brush is free and that only the tooth paste is paid for is false in fact. * * *"

Need petitioners offer any better elucidation of the correctness and fairness of their practice and literature?

(4). The Federal Trade Commission itself expressed its full accord with the foregoing in its decision in *Matter of Samuel Stores, Inc.*, 27 FTC 882 (1938). Therein the Commission recognized the question to be (at p. 886, italics supplied):

> "Whether, under all the circumstances, the offering of the so-called 'free goods', *which was conditioned upon the purchase of other merchandise,* is an unfair method of competition."

As in the case at bar

> "The advertisements * * * clearly and conspicuously stated the terms and conditions under which the so-called 'free goods' may be obtained by customers" (p. 886).

and "the 'free goods' were actually given to all" who *fulfilled "the conditions upon which the gift was predicated"* (p. 886).

Far from proscribing the use of the word "free" except when something was offered wholly without conditions, the Commission said (at p. 889):

> "The lawfulness of an offer of 'free goods' in connection with a merchandising plan depends on the terms of the offer and the underlying and surrounding facts."

and the Commission proceeded to differentiate the cases where the conditions were plainly stated and thus no one

was deceived from the cases where there existed misleading or chicanery at one time or another.

The fact, however, that the offeror intended to profit from his offer, in one way or another, was held to be immaterial. The only relevant question was whether the offeree was being fooled or cheated. That appears from the Commission's express recognition that in all instances "undoubtedly the merchant expects to benefit" from the offer and distribution of such "free goods" and the cost thereof to the merchant, in one way or another, is borne by the sold goods; nevertheless, the Commission held, where "the purchaser actually does obtain the specified 'free goods' at no additional cost over the ordinary and regular price of the merchandise required to be purchased", "As far as the purchaser is concerned, * * * he actually receives the 'free goods' without cost" and the offer and the advertising, therefore, are not "deceptive". In consequence, the Commission concluded (at p. 888):

> "The real test, except where the practice is employed by large concerns to eliminate weaker competitors, is whether there is a deception of the purchaser or use of a lottery method or chance device in the distribution of 'free goods'. Where, as in this case, advertisements offering the 'free goods' clearly and conspicuously state the terms and conditions under which the 'free goods' may be secured, the merchant does not occupy a monopolistic or near monopolistic position, the 'free goods' are not distributed by lot or chance, and there is no deception through fictitious price marking of the goods sold, or through substitution of inferior merchandise or otherwise, the 'free goods' offer does not constitute, in the opinion of the Commission, an unfair method of competition, and the complaint is accordingly dismissed."

(5). Since, here, to become entitled to and to receive the offered "free" articles, petitioners' sales agents were

not required to do anything which they did not do to earn their full per unit commissions, petitioners' use of the word "free" completely conforms to the Commission's concepts as urged upon this Court in the *Standard Education Society* case and written into the Commission's decision in the *Samuel Stores* case and into the 1938-1940 orders entered in the numerous cases referred to on pages 13-14, *supra*.

For each sale, petitioners' selling agent receives full commissions. The free articles are extra in the event and for the attainment of specified aggregates of sales—a reward in addition to the commissions earned and paid on each component sale. The effort in selling the twelfth dress is precisely the same as selling the eleventh, the tenth or the ninth. The work, in each instance, is the same. The compensation for each is the same. The free article is offered as an extra reward for attaining the aggregate. *When something extra is given because of the aggregate of twelve (each of which is fully paid for) that extra is free.* No charge is made therefor. Nothing is done to earn it which already has not been done for the per unit commission.

Petitioners' leaflets and circulars never used the word "free" except in contexts which lucidly and fairly described them as extra rewards for services, such as "SELL 12 Dresses and GET a $5.00 Dress FREE"—"in ADDITION to the Commissions . . . These Free Dresses are given for orders you send in each month and those orders must be accepted and paid for by the customers . . . only orders that have been accepted and paid for are counted in the Free Dress Offer" (Commission's Exhibit 7 at R. 48, and Respondent's Exhibit 2 at R. 53); "WHAT IS YOUR PROFIT OR COMMISSION? Your profit or commission is the deposit stated on each Style Sheet under each garment. In addition you receive FREE DRESSES and SPECIAL BONUSES" (Commission's Exhibit 8 at R. 50; similarly Respondent's Exhibit 1 at R. 52). Commission's Ex-

hibit 10 (R. 51) explained that the free items were an offer of "a special bonus to Active Representatives" whereby "practically" each "earns ... dresses ... without any cost to her"—note the "earns". In every instance the "free" was correlated with performance and graded to proficiency as, for example (R. 52), "dependent upon how much business you do each month" usually adding up "to another 5% as your profit".

At the risk of unnecessary repetition, we emphasize that the fact is that for each component sale, petitioners pay the full fixed commission, and the free item is for the accumulation or aggregate of achievement without any service which is not rendered (and completely paid for) in the earning of the commission on each sale. The testimony on that point was clear and uncontradicted, as follows:

On direct examination by Commission's counsel of petitioner Joseph Rosenblum, as a witness for the Commission, at R. 41:

> "Q. And if they sell only one dress, do they get the commission on that? A. Yes.
>
> Q. And if they sell two, they get the commission on those, and so on? A. Yes.
>
> Q. And if they sell a number, as set out here, starting with 12 dresses, they will get a dress free? A. Yes.
>
> Q. That is in addition to the regular commission? A. Yes; they get about 20 per cent commission, I would say."

On cross examination by petitioners' counsel, R. 45-46:

> "Q. Your agents or salesladies are paid a fixed rate of commission, are they not? A. Yes.
>
> Q. And that rate is the same, regardless of the quantity sold by them? A. Yes.
>
> Q. And do you in addition to paying the fixed rate of commissions give to your salesladies when they

sell certain quantities, aggregating certain amounts, what you call free or bonus dresses, or garments? A. Yes.

Q. And when they earn or become entitled to this free or bonus garment, the salesladies have to do nothing, in addition to the sales they make for which they receive the fixed rate of commissions? A. That is right.

* * *

Q. And you make absolutely no charge therefor? A. Absolutely no charge."

(6). *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 Fed. 2d 103, cited by the Court below, is as inapplicable as *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112. There, the word "free" was used in advertisements in newspapers and periodicals, without any qualification and without any indication that services will be required. After the advertisement, with its unqualified "free" offer, succeeded as a "come on" to the extent of having the reader write to the Tailoring Company, the latter sent him circulars which were so tricky, in word and type arrangement, that, except to the careful reader, they continued the delusion that a suit could be procured absolutely "free".

That it was the actual dishonesty of the advertising that led to the decision in that case and not a doctrinaire definition of a word, is attested by the fact that the same Court, 10½ months later, decided in favor of the advertiser in *Parker Pen Co.* v. *Federal Trade Commission, supra* (see pages 29-30, *infra*).

(7). It is difficult to perceive why the Court of Appeals in the case at bar cited its own previous decision in *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 Fed. 2d 676 (1944). The word "free" was not involved in that case. It was a common variety case of a falsely labeled cosmetic offered with completely false representa-

tions of benefits to be derived from its use. If the case was cited because of the statements therein (at p. 680) that the "Commission may 'insist upon the most literal truthfulness in advertisements' and 'should have the discretion * * * to insist * * * "upon a form of advertising clear enough so that in the words of the Prophet Isaiah, 'Wayfaring men, though fools, shall not err therein' " ' " —those statements do not support the judgment in this case since the Commission itself has recognized that the complained of circulars and pamphlets efficiently conveyed the literal truth to those reading them, as evidenced by the statements (at p. 17 of the Record) that the communications "clearly set forth the terms and conditions of [petitioners'] offer of 'free' merchandise", and (at p. 18 of the Record) that "no evidence was adduced that anyone, in fact, was misled or deceived".

(8). The sense in which petitioners use the word "free" is in accordance with common usage.

Rarely, if ever, does "free" connote a total absence of condition or of requirement of something by way of qualification. *Usually, to get something free, one must qualify in one way or another.*

The Commission's *present* notion that something is free *only* if made available unconditionally, is contrary to ordinary usage—contrary to the common understanding of the word as the Commission itself recognized in its own carefully considered and meticulously delineated decision in *Matter of Samuel Stores, Inc., supra* at pages 20-21, and followed by it in the many cases noted at pages 13-14, *supra.*

Surely, the philanthropist who offers a million dollars on condition that a building be erected bearing a name specified by him, would be shocked to be informed—and so would everyone else—that his contribution is not a gift or gratuity and that it is misleading and deceptive or fraudulent to refer thereto as a gift!

In our daily affairs, one gets a "free" transfer to another conveyance, even though he cannot get it without paying the initial fare; one gets a "rain check" free although he cannot get it without having paid for the original admission; so, too, one may have (or, in former days, could have had) an extra cup of coffee free, or a second helping, but he had to pay for his meal. In each of these instances, there is a payment at some prior point; but the *supplementary benefit is without extra charge,* and, so, in accepted parlance, is said to be "free".

So, too, schools, parks, and other municipal services and facilities, customarily and universally, are referred to as "free", although, of course, from an economic and political point of view, they are paid for by the people through their taxes. They are free in the sense that no extra charge is made for the availing oneself of the facility or service. That is the usage of the word "free" to which all of us are addicted.

So long as the specified qualifications or conditions or requirements are acts which otherwise are fully required for something else, that which is given, generally, is said to be "free".

The Federal Trade Commission, it is submitted may not legislate the meaning or usage of ordinary words. Where a word, as most words, has a variety of meanings, depending upon context,[5] the Commission may not restrict its use to conform to what it may deem advisable in the in-

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[5] As is pointed out in "Language Habits in Human Affairs", by Irving J. Lee, Harper & Bros., 1941, in Chapter III, under the sub-heading "The Myth of the One-and-only Meaning" (at pp. 35-37), there is "inherent ambiguity" in our language and words have a "pluralistic functioning" so that "the curious notion that it is possible to discover the one 'real and proper' meaning of any word" is demonstrably false. Warning that "one must not be misled into supposing that a word can function apart from the sentence or totality of discourse in which it may be used", the author continues:

(footnote continued on following page)

terests of clarifying the English language and reforming it to scientific exactitude. In short, the Federal Trade Commission are not legislating lexicographers, or authorized arbiters of the English language. The Commission must accept the English language as it finds it; it must accept words for what they mean to the general public or to the special class (if any) involved. It may not, we submit, impose what it thinks academically should be the connotation of words in an ideal language scientifically precise and meticulously refined and specialized.

The meaning to ordinary people of a word in ordinary and daily use, *as to which no evidence is offered,* is, we submit, not a matter as to which the Commission can make a finding which is conclusive because "supported by evidence". At best, it is a conclusion of law on which the Court must exercise its independent judgment (*Carter Products, Inc.* v. *Federal Trade Commission,* 186 Fed. 2d 821, 824 C. A. 2d, 1951; cf. *Benton Announcements, Inc.* v. *Federal Trade Commission,* 130 Fed. 2d 254, C. A. 2d, 1942; *James S. Kirk & Co.* v. *Federal Trade Commiisison,* 59 Fed. 2d 179, 181, C. A. 7th, 1932, c. d. 287 U. S. 663).

(*footnote continued from preceding page*)

> "A word may be related to its context in the way a letter is related to the word in which it appears. In each case word and letter are but parts of a larger unit, and their characteristics are best studied only as they appear in those units. Just as it is not possible to describe the sound—or stress—value of a letter before it exists in a word, so, too, it is pointless to assume a use-value of a word distinct from its use in discourse" (at p. 37).

Among a number of illustrations, the author (at page 35) cites ten different significations of "X", including the number ten, a wholly unknown quantity, a kiss, the mark of an illiterate in lieu of a signature, etc., and quotes from "The Notebook of M. Ravel" a complaint "concerning the absurdities of the word 'fast'. A horse was fast when he was tied to a hitching post. The same animal was also fast under exactly diametric circumstances—when he was running away. A woman was fast when she smoked cigarettes. A color was fast if it didn't fade. To fast was to go without food. Et cetera."

Language is not unfair and is not deceptive if, and when, it lucidly conveys to the reader the truth. The more certainly, the more simply, the more lucidly, the more succinctly, and the more efficiently the language conveys the truth, the more serviceable it is as a means of honest intercourse, including honest and fair commerce. Arbitrary rules and standards which require circumlocution or involved statements, in attempted attainment of an idealistic precision, are self-defeating—they defeat the aim for clarity. Too often, efforts to make language minutely precise and complete result in verbosity which to the average layman is confusing and meaningless, as witness the statutes and regulations—and frequently the pleadings—prepared by lawyers.

Petitioners are under a business necessity to make their circulars and pamphlets to their home-folk sales people simple and crisp and clear—in words which most readily and plainly convey to those readers—not to professors or critics of English, not scientists, not hair-splitters—the intended meaning. Language which conveys the truth to those to whom the matter is addressed cannot be condemned as deceptive or unfair. The law is not opposed to such communications being attractive or impressive. The Federal Trade Commission Act is not a law to suppress success in advertising. Its purpose is to require truth. That which successfully conveys the truth is not illegal.

POINT III

The decision herein is in conflict with the doctrine of *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946) and *Parker Pen Co.* v. *Federal Trade Commission*, 159 Fed. 2d 509 (C. A. 7th, 1946).

Even if the word "free" reasonably could be held to have only the ultra-restricted meaning with which the Commission would like to invest it, there would be no

basis for a cease and desist order here since the petitioners do not use the word in isolation but in contexts which simply and with absolute clarity convey the entire truth.

In *Jacob Siegel Co.* v. *Federal Trade Commission, supra,* the word "Alpacuna" was applied to a fabric which contained fleece of neither the alpaca nor the vicuna. Hence, as so used, it was inherently deceptive. Nevertheless, it did not follow, this Court said, that the use of the term should be proscribed, for if the term could be used with "qualifying language" which "would eliminate the deception which [was] lurking in the word 'Alpacuna'" when used alone, the proper step was to require such qualifying language rather than absolute prohibition.

In the case at bar it is not necessary to direct the petitioners to use qualifying language, for the texts in which the word "free" appears leave no room for misunderstanding. Consequently, it is submitted, the complained of order is entirely without basis.

Parker Pen Co. v. *Federal Trade Commission, supra,* is another case in point. There, the Federal Trade Commission contended that the term "Guaranteed for Life" and similar phrases connoted an undertaking that if the sold article should fail properly to function through no fault of the user, the advertiser would repair or replace it without charge. No doubt, that is the usual meaning of a "guarantee" of a sold article. However, in that case, a charge of thirty-five cents was made whenever the pen was brought or sent in for repair or servicing. While the advertising of the Parker Pen Co. disclosed that such a charge would be made, the advertisements were objectionable in that the phrase "Guaranteed for Life" was printed in very conspicuous type and only remotely therefrom and in small type did there appear a statement to the effect that a charge of thirty-five cents would be made

each time the pen required repair or servicing. The Federal Trade Commission ordered the Parker Pen Co. to cease and desist from using the slogan "Guaranteed for Life" or variants thereof. The Circuit Court of Appeals held that that prohibition went too far, that although the term "guaranteed" when unqualified connoted repair or replacement free of charge, there was no objection to using the term in a qualified sense provided the qualification was made clear.

So, it should follow that the petitioners have the right to use the word "free" in a context the whole of which fairly and plainly conveys the true offer and terms of employment, particularly since such use of the word most clearly and most efficiently brings home to the reader the true terms in language most readily understood by the reader.

The force of this argument is more fully appreciated when an attempt is made to convey petitioners' offer without using the word "free". In petitioners' brief to the Court of Appeals (at p. 11), it was suggested to counsel for the Commission that they "show the Court how they would set forth the offer without using the word 'free' and let us see whether that will just as simply and clearly convey the intended meaning". Counsel for the Commission, in their answering brief (at pp. 19-20), took note of the suggestion, but offered no solution beyond saying "that simply telling the truth will amply and accurately describe their offer. Merely by informing the saleswoman-to-be that she can earn her own dresses by exceeding the set quotas, petitioners can fairly describe their offer. Furthermore, the Commission has not forbidden petitioners to use the word 'bonus' • • •".

Prayer

WHEREFORE, petitioners respectfully pray that this petition for a writ of certiorari to review the complained of order and judgment be granted.

Dated: New York, New York,
February 1, 1952.

JOSEPH ROSENBLUM,
SADIE ROSENBLUM,

By COPAL MINTZ,
Attorney for Petitioners.

BRIEF

FOR THE RESPONDENTS

IN

OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 566

JOSEPH ROSENBLUM AND SADIE ROSENBLUM, CO-PARTNERS, TRADING AND DOING BUSINESS AS MODERN MANNER CLOTHES, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 54) is reported at 192 F. 2d 392. The findings and conclusion of the Federal Trade Commission appear at R. 6-11.

JURISDICTION

The final decree of the court of appeals (R. 55-56) was entered on December 19, 1951. The peti-

tion for writ of certiorari was filed on February 2, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In January 1945, the Federal Trade Commission issued a complaint against petitioner Joseph Rosenblum, an individual trading as Modern Manner Clothes, charging *inter alia,* the use of deceptive acts and practices in violation of the Federal Trade Commission Act (R. 23-27). The complaint was subsequently amended, upon consent of the parties, to cover petitioner Sadie Rosenblum, copartner of Joseph Rosenblum (R. 2). After hearings before an examiner, the filing of an examiner's report and exceptions thereto, and argument before the Commission, the Commission entered its find-

ings and conclusion (R. 6-11) and issued an order to cease and desist (R. 4-5). The order, dated December 1950, directs that petitioners, in connection with offering for sale, selling or distributing wearing apparel or other items of merchandise, forthwith desist from—

> Using the word "free," or any other word or words of similar import or meaning, to designate, describe, or refer to wearing apparel, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the performance of some service inuring directly or indirectly to the benefit of the [petitioners].

On February 15, 1951, petitioners filed a petition in the Court of Appeals for the Second Circuit to set aside the order (R. A-F). The court of appeals (Judges Augustus N. Hand, Chase, and Clark) affirmed the order *per curiam* (R. 54).

The essential facts are undisputed. Petitioners maintain their principal place of business in New York, New York, and trade as Modern Manner Clothes. They are engaged in selling and distributing wearing apparel, such as women's suits, dresses and similar articles. In the conduct of their business, they employ women agents, located in all sections of the country, to sell Modern Manner Clothes to the buying public by house-to-house canvassing. (R. 23-24, 27, 31.) The interstate character of the trade is admitted (R. 24, 27).

Prospective sales agents are contacted by advertisements, of which the following is typical (R. 25):

> WE START YOU IN BUSINESS
>
> Fifth Avenue, New York firm desires women to sell dresses, coats, sportswear, negligee, lingerie featured in "Vogue" and "Mademoiselle." Also children's garments. Good commission. Sample book free. Write Modern Manner * * * New York.

Women answering petitioners' advertisements receive a letter to the following effect (Ex. 5, R. 47):

> Dear Madam:
>
> We received your letter in answer to our advertisement. Thank you.
>
> [Then follow 5 paragraphs of matter not presently material.]
>
> You will receive the additional Style Sheets after you send in some orders. Modern Manner offers you a marvelous opportunity. You can build a profitable business and earn money selling these smart New York Dresses. Please do not forget to read the circular offering you FREE DRESSES every month.
>
> Good luck and good wishes in your new venture.

Shortly after, petitioners send the prospective sales agent an "outfit" consisting of an order book, business cards, envelopes, tape measure, style

sheets and other literature (R. 34, 43). Through this literature and other follow-up material which petitioners circulate, prospective saleswomen are informed that if they become petitioners' representatives they will receive, in addition to regular commissions, "free" clothing (R. 8-9, 33-38, 43). The following representations are typical:

> WHAT IS YOUR PROFIT OR COMMISSION? Your profit or commission is the deposit stated on each Style Sheet under each garment. In addition you receive FREE DRESSES AND SPECIAL BONUSES.
>
> * * * * *
>
> YOUR OWN DRESSES OR COATS FREE
>
> MODERN MANNER enables you to have all your own personal Dresses, Suits and Coats FREE. We offer everybody a BONUS OF FREE DRESSES. See our Free Dress Offer.
>
> MODERN MANNER Representatives are regarded as the most beautifully dressed women in their communities. Most of them receive at least one Free Dress a month and a few get as many as three and four new Dresses every month Free for personal wear. [Ex. 8, R. 50.]

> *Your Own Dresses FREE*
>
> MODERN MANNER enables you to have all your personal dresses, suits, coats, lingerie FREE. Every month MODERN MANNER offers a spe-

cial bonus to Active Representatives. Practically every MODERN MANNER representative earns at least from 5 to 12 dresses a season without any cost to her.

MODERN MANNER representatives are regarded among the most beautifully dressed women in their communities. By getting all these Free Bonus Dresses you have a complete wardrobe of smart Fifth Avenue Styles. [Ex. 10, R. 51.]

FREE DRESSES EVERY MONTH FOR YOU!

MODERN MANNER representatives are reputed to be the most beautifully dressed women in their communities, because in ADDITION to the Commissions they earn, they get Free Dresses every month.

Many Modern Manner Representatives get from *two* to *five* Free Dresses each month. Of course, most of them wear them themselves or use them for samples. Some even sell them. You too have a most marvelous opportunity to get your new wardrobe of smart Modern Manner Fifth Avenue styles without any cost to you.

Here is our special offer!!

SELL 12 Dresses and Get a $5.00 Dress Free
SELL 15 Dresses and Get a $6.00 Dress Free
SELL 20 Dresses and Get a $9.00 Dress Free
SELL 25 Dresses and Get a $12.00 Dress Free
SELL 30 Dresses and Get a $15.00 Dress Free
(or 3—$5.00)

> Please remember. These Free Dresses are given for orders you send in each month and those orders must be accepted and paid for by the customers. [Ex. 7, R. 48-49.]

Petitioners contended that the representations concerning "free" dresses were not violative of the Act because, read in context, they "plainly set forth the true terms of employment" (R. 28). They further urged (*ibid.*) that the dresses offered the agent were in fact free because they were in addition to regular commissions paid for each sale effected by the agent. The Commission found that the representations were false, misleading and deceptive, stating (R. 9-10):

> In truth and in fact the respondents do not give the dresses or other articles of wearing apparel free, but require the payment of a valuable consideration on the part of the agents or salespersons in the form of service and the sale of a certain number of articles of wearing apparel by said agents or salespersons before the same are delivered to the agents or salespersons. The said condition and requirement to the procurement of said garments is not disclosed in the initial advertisement by which contact is first made but is made in later correspondence with prospective distributors.[1]

[1] As indicated by a careful reading of the sales report form disseminated by petitioners (Ex. 7, R. 48; Ex. 2, R. 52), a sales agent, in order to get a single $5 dress, has to secure twelve paid-up orders *within a calendar month*. Other literature of petitioners does not disclose the conditions to which acquisition of a "free" dress is subject.

No agents were called as witnesses and no evidence was introduced to show that any agents had in fact been misled (R. 18). The Commission found, however, that petitioners' use of the statements in question "has had, and now has, the capacity and tendency to mislead and deceive prospective distributors of [petitioners'] products into the erroneous and mistaken belief that such false statements and representations are true and that they will receive some of [petitioners'] merchandise free" (R. 10).

ARGUMENT

1. The subject matter of the complaint was plainly within the jurisdiction of the Commission. Section 5 of the Federal Trade Commission Act covers any "unfair method of competition * * * or *deceptive act or practice in commerce.*" Prior to amendment of the statute in 1938, the Act was limited to "unfair methods of competition," and proof of damage to competitors had been held a prerequisite to issuance of a cease and desist order. *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643. In direct consequence of the *Raladam* decision, Congress broadened the statutory language to cover deceptive acts and practices. See House Report No. 1613, 75th Cong., 1st Sess., p. 3. Petitioners quote from the House Report the sentence, "this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." They then proceed to argue

(Petition 15) that the persons to whom they addressed their campaign were prospective agents, rather than consumers, and that such persons are beyond the protection of the statute.

The very sentence of the House Report preceding the sentence quoted by petitioners declares: "By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the *general public* as well as those which are unfair to competitors." [Italics supplied.] In any event, however, it is clear that to the extent petitioners' sales agents (or prospective agents) are induced by the promise of receiving petitioners' merchandise "free", they are *consumers* of such merchandise entitled to full protection against deception. See *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103 (C.A. 7). They are no less members of the consuming public or of the general public, because they are also petitioners' agents or prospective agents; no less entitled to protection because they are induced to pay for the merchandise with services rather than with money. When a seller recruits agents from the newspaper-reading public, offering them the prospect of attractive rewards in the form of merchandise, he is no more entitled to misrepresent the character of that merchandise, or the terms and conditions upon which it may be acquired, than he is entitled to deceive other members of the public at whom he directs his commercial appeals. *Ibid.* A housewife induced to spend her hours canvassing

the neighborhood to secure sales for petitioners, in the expectation of obtaining a dress for herself, is no more fair game for misrepresentation than a housewife who is falsely induced to part with her money in order to obtain a dress.

Petitioners also argue that their acts of representation in connection with the solicitation of sales agents were not "in commerce". But cf. *Memphis Steam Laundry* v. *Stone*, decided March 3, 1952. The contention is that the acts are "anterior to, and in the hope of, commerce" (Petition 16). It is said that the acts, if successful, "may not even result in or be followed by commerce" (*ibid.*). The argument proves far too much. If acts of solicitation, looking to the establishment of interstate business relationships and the initiation of interstate trade, are not acts "in commerce," no false advertisement would be within the Act's reach, since it is plain that all advertisements are "anterior to" acts of transfer or sale and "may not even result" in what petitioners term "commerce". But petitioners can scarcely deny that the effective prohibition of false advertising was a primary purpose of the statute.[2] And they

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[2] The House Report on the bill, *supra*, states (p. 4):

"The need of amending the existing act to give the Federal Trade Commission more effective control over advertising as an unfair practice, is urgent and manifest.

"The provisions of this bill covering false advertising are far reaching but we believe entirely warranted, necessary for the effective control of illegitimate advertising and yet drawn with due regard to the right of legitimate advertising."

are faced with the indisputable fact that the books abound with cases upholding cease and desist orders directed at misleading methods of solicitation. *See, e.g., Parke, Austin & Lipscomb v. Federal Trade Commission*, 142 F. 2d 427 (C.A. 2), certiorari denied, 323 U.S. 733; *Vacu-Matic Carburetor Co. v. Federal Trade Commission*, 137 F. 2d 711 (C.A. 7), certiorari denied, 321 U.S. 806; *Perloff v. Federal Trade Commission*, 150 F. 2d 757 (C.A. 3); *Gulf Oil Corp. v. Federal Trade Commission*, 150 F. 2d 106 (C.A. 5).

2. The Commission's order compels the petitioners to restrict their use of the word "free" to merchandise which is "in truth and in fact a gift or gratuity". It prohibits them from using that term to describe merchandise which the agent can only obtain by performing services which inure to petitioners' benefit. Petitioners contend that the Commission's interpretation of "free" is "doctrinaire and artificial," and that the dresses which they offer to their agents are in fact free within the accepted meaning of the word.

The Commission's interpretation of the word "free", set forth in its order, corresponds precisely to the Agency's interpretation of the term publicly promulgated on January 31, 1940. *Administrative Interpretation regarding Use of the Word "Free"*, 44 F.T.C. 1427, 13 Fed. Reg. 616, 16 C.F.R. § 4.1. This interpretation has been adopted by some fifteen industries in their Trade

Practice Rules.[3] Thus, the recently adopted Rules of the Bedding Manufacturing Industry declare (16 C.F.R. (1950 Supp.) § 195.9):

> *Misuse of the word "free."* Use of the word "free," or words of similar import, when employed to describe any product which is not in truth or in fact a gift or gratuity, or which is not given to the recipient thereof without requiring the purchase of other merchandise, or requiring the performance of some service inuring, directly or indirectly, to the benefit of the industry member using such term, is an unfair trade practice.

Obviously, it does no violence to the English language to insist that "free"denotes something given unconditionally, and that it excludes the notion of a transfer made subject to conditions economically beneficial to the transferor. The charge that the Commission has assumed the role of a "legislating lexicographer" and that it has acted arbitrarily blinks the fact that numerous industries have subscribed to the Commission's definition and that this definition finds unanimous

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[3] Razors and Razor Blades (16 C.F.R. § 161.6); Artificial Limbs (16 C.F.R. § 165.20); Watch Cases (16 C.F.R. § 174.12); Lead Pencils (16 C.F.R. § 162.3); Wholesale Confectionery (Philadelphia Area) (16 C.F.R. § 168.5); Oil Heating Industry (New England States) (16 C.F.R. (1950 Supp.) § 183.4); Piston Rings (16 C.F.R. § 166.7); Wholesale Confectionery (16 C.F.R. § 176.5); Baby Chicks (16 C.F.R. § 178.24); Fountain Pens and Mechanical Pencils (16 C.F.R. (1950 Supp.) § 184.4); Candy Manufacturing (16 C.F.R. (1950 Supp.) § 186.3); Cocoa and Chocolate (16 C.F.R. (1950 Supp.) § 194.2); Venetian Blinds (16 C.F.R. (1950 Supp.) § 191.8); Bedding Manufacturing (16 C.F.R. (1950 Supp.) § 195.9); Umbrellas (16 C.F.R. (1950 Supp.) § 145.6).

support in standard dictionaries. Webster defines "free" as "Given or furnished without cost or payment; gratuitous; as, free admission; a free pass."[4] Funk & Wagnalls states, "Without charge or cost; gratuitous, as free seats".[5] Thorndike-Barnhart says, "Without cost, payment or return".[6] And the Oxford Dictionary declares:[7]

> Given out of liberality or generosity (not in return or requital for something else).
>
> * * * * *
>
> [Short for] *free of cost, charge,* or the like. Given or provided without payment, costless, gratuitous.

Not one of the authorities lends the slightest support to petitioners' effort to equate "free" with "bonus".

The situation presented by the instant case is entirely familiar to men of ordinary affairs. Every consumer knows that he sometimes gets a better "buy" by purchasing in quantity. Thus, when a housewife purchases, at eleven for a dollar, an item that sells for ten cents apiece, she knows she is getting more for her money by purchasing eleven than she would by buying a lesser number. But she also knows that in both cases she is party to a bargain and that in neither case is she the recipient of a gift or gratuity.

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[4] Webster's New International Dictionary, 2nd Edition, 1939.

[5] Funk & Wagnalls New College Standard Dictionary, 1947.

[6] Thorndike-Barnhart Comprehensive Desk Dictionary, 1951.

[7] Oxford English Dictionary, vol. IV.

Similarly, it is common for manufacturers' representatives and salesmen to work on a sliding commission, *e.g.,* 10 percent of the gross up to $10,000 in sales, 12½ percent on all sales between $10,000 and $20,000, and 15 percent on all sales above $20,000. But it would be folly to say that the salesman who does more than $10,000 worth of business and thereby earns a higher rate of commission is getting something "free". He is simply getting higher compensation in recognition of the fact that his efforts on his employer's behalf have proved increasingly productive. By the same token, the saleswoman who receives a $5 dress, in addition to her regular commission, by selling 12 of petitioners' garments in a calendar month, is earning what she gets. She is receiving some additional compensation for having performed a more difficult task. She is not getting the dress "free"—neither by dictionary definition, nor as a matter of common usage and sense.

In matters of advertising and other forms of commercial representation, it is the Commission's job to insist on "literal truthfulness" (*Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112, 116; *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 680 (C.A. 2)), a task for which it is specially qualified. *Federal Trade Commission* v. *Keppel and Bro.,* 291 U.S. 304, 314. The word "free", offering as it does the promise of something for

nothing, has the strongest kind of psychological appeal. It is a veritable trap, especially for the inexperienced and the untutored. This Court has previously affirmed the Commission's efforts to prevent misuse of the term and to protect the unwary. *Federal Trade Commission* v. *Standard Education Society, supra.* See, also, the decision of the Court of Appeals for the Seventh Circuit in *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103 (C.A. 7), discussed at pp. 17-18, *infra.* The remedy the Commission has adopted here to curb the abuse is eminently fair and reasonable. The order leaves petitioners free to advertise the dresses they offer as bonuses or as extra compensation. It forbids them only from featuring as "free" that which is conditional upon the performance of valuable services.

3. Petitioners argue that, even if the dresses they offer are not, properly speaking, free, their circulars are nonetheless innocuous because they disclose the true terms of employment. The use of "free", it is said, must be taken in context. In this connection, petitioners cite *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, and *Parker Pen Co.* v. *Federal Trade Commission,* 159 F. 2d 509 (C.A. 7) for the proposition that words which may be misleading, when unqualified, may be unobjectionable when accompanied by a full and clear explanation.[8]

[8] Neither of these cases involved use of the word "free".

While we agree that the vice which attaches to the deceptive use of ambiguous language may be cured, in some circumstances, by supplementary explanation, the fact is that the concept "free" necessarily excludes payment of a *quid pro quo,* either in money or in services. When that word is used to describe merchandise which can be acquired only by the performance of valuable services, it is inherently and incurably false and deceptive. It would scarcely be suggested that one might emblazon at the top of an advertising layout the words "100% Silk Dresses" and cure the falsity of such a statement by declaring, somewhere in the text, that the dresses are made of a synthetic which gives them the appearance of being 100% silk. *Cf. Federal Trade Commission* v. *Army & Navy Trading Co.,* 88 F. 2d 776 (C.A. D.C.). The same principle applies here.

But not only is petitioners' use of "free" inherently and incurably false; the statements which are said to disclose the real terms of employment are wholly inadequate for the purpose. The initial advertisement and the initial letter sent to the prospective agent make no reference whatever to the terms of employment. The reader is induced to answer the letter by reason of the unqualified reference to an offering of "FREE DRESSES." See page 4, *supra.* Indeed, the only paper (included in the "outfit" sent subsequently) which discloses that the "free" dresses *cost* something is the form

which the sales agent is required to fill out in reporting her monthly sales. A reading of this form (R. 48, 52) discloses the conditions. But the prospective agent, before reading this form, is likely to have firmly implanted in her mind the notion that she is going to get something free. Moreover, even if she reads the form with extreme care, she may do so for the first time only at the point when she is prepared to report sales, *i.e.*, at a time when she has already taken numerous steps to her detriment in reliance upon the previously unexplained and highly stressed inducement of "free" merchandise.

As indicated by the following quotation from the opinion in *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103, 104 (C. A. 7), that case involved a sales scheme closely resembling petitioners':

> [Petitioners] employ salesmen who sell their garments to the public, and in soliciting the services of these salesmen, they place advertisements in magazines, newspapers, and periodicals which have an interstate circulation. In the advertisements they represent that a free suit will be given to such salesmen. After prospective salesmen answer the preliminary advertisements, petitioners mail circulars to the inquirer in which they continue to refer to the suits as "free" but in which they also explain, in comparatively inconspicuous type, that the suit is not free but is sold to the sales-

> man in return for his services. According to these circulars, if they are read and analyzed, the salesman will receive a commission for each garment he sells, and if he sells a certain number of garments, he will receive a suit for himself. The salesman must sell the required number of garments and pay petitioners their money before petitioners will deliver the suit to him. Petitioners make a profit on the entire transaction with each salesman after taking into consideration the cost of the suit delivered to the salesman for his services.

The court sustained the Commission's order to cease and desist using the word "free", notwithstanding the fact that the prospective salesmen were subsequently given information from which they might glean knowledge of the conditions that had to be fulfilled before the "free" suit would be forthcoming.

Petitioners, discussing the *Progress Tailoring* case, state that the circulars which Progress sent were "so tricky, in word and type arrangement, that, except to the careful reader, they continued the delusion that a suit could be procured absolutely 'free' " (Petition 24). Whatever the precise differences between the wording and arrangement of the Progress circulars and those of Modern Manner, certainly at most they are differences in degree rather than in kind. As the Commission found, Modern Manner circulars also have "the capacity and tendency to mislead and deceive"

(R. 10). They, too, implant the notion of "free" in such a way that, except to the careful reader, "the delusion" may continue.

Petitioners point out that no testimony was adduced to show that agents were actually misled. Commission orders, however, are prophylactic in purpose. It suffices to show that representations are potentially harmful in that they have a natural propensity to deceive the public. *Federal Trade Commission* v. *Raladam Co.,* 316 U.S. 149, 152; *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission, supra,* at 680; *Perloff* v. *Federal Trade Commission, supra,* at 759; *Fioret Sales Co., Inc.* v. *Federal Trade Commission,* 100 F. 2d 358, 359 (C.A. 2); *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (C.A. 10).

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

No. 566

JOSEPH ROSENBLUM and SADIE ROSENBLUM, Co-Partners, trading and doing business as MODERN MANNER CLOTHES,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

(1). Respondent's brief suggests that the word "bonus" in place of "free" would be agreeable to the Commission.

But—apart from the question of what, if any, meaning the word "bonus" would convey to the *"untutored", "inexperienced", and "unwary"* home-folk women the Commission and its brief postulate—the dictionary definitions of "bonus", as, for example, set forth in the American College Dictionary (Random House) are (italics supplied):

> "1. something given or paid *over and above what is due.* 2. a sum of money paid to an employee, an agent of a company, a returned soldier, etc., over and above his regular pay. 3. something *free* added in a corporate sale of securities. 4. Insurance dividend. 5. a premium paid for a loan, contract, etc. 6. something extra.

—Syn. 2. BONUS, BOUNTY, PREMIUM refer to something extra beyond a stipulated payment. A BONUS is a *gift* to reward performance, paid either by a private employer or by a government: a bonus based on salary, the soldiers bonus. A BOUNTY * * *."

Webster's New International Dictionary does not include the definition of "something free added * * *", and limits the word, as far as applicable, to describe something given without obligation to do so: "something given in addition to what is ordinarily received by, or strictly due, the recipient; specif.: a. A premium given for a loan, or for a charter or other privilege granted to a company. b. An extra dividend to the shareholders of a company, out of accumulated profits. c. Money, or other valuable, given in addition to an agreed compensation * * *."

Since petitioners' offers are made in advance of and to induce services, performance thereof by petitioners is legally obligatory and not sheer bounty; therefore, any word which represents the reward as "over and above what is due" should be objected to by the Commission as deceptive. It would not correctly describe the intent, for it would leave petitioners legally free to refuse performance on their part on the ground that performance remained wholly optional. To hold petitioners legally obligated to perform, it would have to be maintained that the word "bonus" was used in the sense of a binding committal to give "something *free* added * * *." Then is not the use of the word "free" more direct and more definitive?

The dictionary definitions of "free", quoted on page 13 of respondent's brief, are but several of many. Webster's New International Dictionary devotes almost an entire page to the word "free"—about half of the space to "free" standing alone and the balance to uses in combination with other words beginning with "free alms" and

ending with "free will" and including "free on board". "Free on board" certainly is not "free" in the absolutist sense conceived by the Commission—in the opinion of the Commission, should not that phrase be proscribed as unfair and deceptive?

We submit that respondent's suggestion that the word "bonus" may be used serves, in the light of the above, to emphasize the inextricable dilemna and fallacy of any doctrinaire only-one-proper-use attitude in respect to the words of the English language. The only rational, practical and permissible criterion, it is submitted, is the clarity of the meaning of the context and not of any single word thereof.

(2). As to the criticism in respondent's brief that not every single piece of petitioners' literature sets forth all the details of their offers, the detriment thereof, according to respondent's brief, is that, of the several pieces of literature which the agent receives in her "outfit", she might not read the one setting forth the full terms until "at a time when she has already taken numerous steps to her detriment in reliance upon the previously unexplained and highly stressed inducement of 'free' merchandise" (at p. 17). But if the other items of petitioners' literature, or any of them, conveyed the impression that dresses were to be had for the asking without any services—which is the Commission's complaint—then the recipient of the literature would not have taken any of the "numerous steps to her detriment" in an effort to qualify for the reward. If even careless or incomplete reading—if any reading—made clear the necessity of services and accomplishment, then where is the misleading or deception? And if petitioners so arrange their literature—by an element of suspense—as to insure the reading of all of it, wherein is the wrong?

The quoted argument, it is submitted, acknowledges the lack of substance to the contention that any of the litera-

ture serves to create a belief or hope of "a gift or gratuity • • • without • • • service inuring directly or indirectly to the benefit" of petitioners.

(3). Since the Commission's power is limited to restraining that which is "*in* commerce" and does not extend to that which only "*affects* commerce", we respectfully urge that Point I (pp. 14-16) of the petition is well taken. We did not argue that the Commission has no jurisdiction over advertising. We argued only that it has no jurisdiction over circulars or communications between a merchant and his sales representatives in the absence of injury to competition. This is not a case of advertising in the public press—since the "We start you in business" advertisement (quoted at top of p. 4 of the respondent's brief) plainly is beyond criticism or objection; nor is this a case of general circularization or of circularization of customers or prospective buyers. There is a finding in this case only of "capacity and tendency to mislead and deceive prospective distributors" (finding "Six", R. 10)—not consumers, not purchasers, not the general public.

We submit that the difference here is in kind and not only in degree. But even differences of degree may be important and often are controlling in the determination of whether commerce is affected, not to say whether a given step actually is *in* commerce.

Respectfully submitted,

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March 11, 1962.